No. 15047

# United States
# COURT OF APPEALS
## for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

MONROE FEED STORE,
*Respondent.*

## BRIEF FOR MONROE FEED STORE

*On Petition for Enforcement and Petition for Review of Order of the National Labor Relations Board.*



WILLIAM J. MASTERS of
MASTERS & MASTERS,
*Attorneys for Monroe Feed Store.*

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-56

INDEX

## INDEX (Cont.)



## AUTHORITIES CITED

### Cases

AUTHORITIES CITED (Cont.)



MISCELLANEOUS

No. 15047

# United States
# COURT OF APPEALS
## for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

MONROE FEED STORE,
*Respondent.*

## BRIEF FOR MONROE FEED STORE

*On Petition for Enforcement and Petition for Review of Order of the National Labor Relations Board.*

## STATEMENT OF CASE

The Board found that respondent violated Section 8(a)(1) of the Act by threatening and interrogating its employees with respect to union activities and by discharging certain of its employees, and that respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and by granting unilateral wage increases.

The Board ordered that respondent cease and desist from interrogating employees or interfering with em-

ployees, in violation of the Act and to cease and desist from refusing to bargain collectively. The Board further ordered that respondent offer to all its employees who were discharged on October 30, 1953, immediate and full reinstatement to their former or substantially equivalent position without prejudice to their seniority or other rights or privileges and that respondent make all such employees whole for any loss of earnings they may have suffered from October 30, 1953, to the date of rehire or offer of reinstatement, and the Board further ordered that respondent, upon request, bargain with the American Federation of Grain Millers, Local 61, AFL. This proceeding raises the question of whether or not the findings of the Board with respect to questions of fact and the conclusions of law based thereon are supported by substantial evidence on the record considered as a whole, and the question of whether or not the decision and order of the NLRB is reasonably designed to effectuate the policies of the NLRA. These matters were argued before the NLRB through respondent's exceptions to the Intermediate Report and Recommended Order of the Trial Examiner, and are raised in this Court under Section 10(e) and 10(f) of the NLRA as amended.

During the hearing upon the complaint, the Trial Examiner rejected as incompetent an offer by respondent to introduce into evidence an affidavit of one, David Crockett, deceased, taken by a Field Examiner for the NLRB prior to the hearing upon the complaint. This witness was deceased, the evidence in the affidavit was material, no reason was given for its rejection, and the

rejection of this affidavit raises the question as to whether or not respondent was denied due process of law by reason of the bias and prejudice of the Trial Examiner in rejecting the affidavit as evidence.

Subsequent to the decision and order of the NLRB, respondent filed a motion with the NLRB for an order modifying or setting aside the findings, conclusions and recommendations of the Trial Examiner and Order of the Board or in the alternative, for an order reopening the hearing for the receipt of further testimony. These motions were denied by the Board, raising the question of whether or not the board acted arbitrarily, and capriciously, and abused their discretion, thereby denying due process of law to respondent by denying respondent's motion.

## SPECIFICATION OF ERROR I

The Board erred in finding that respondent violated Section 8(a)(1) of the Act by threatening and interrogating its employees with respect to union activity, and by discharging certain of its employees with the purpose of interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

### ARGUMENT

Section 10(e) and Section 10(f) of the National Labor Relations Act, as amended, state that the findings of the Board with respect to question of fact *if sup-*

*ported by substantial evidence on the record considered as a whole,* shall be conclusive. Prior to the amendments of 1947, the law provided that the Board's factual findings were conclusive if supported by evidence. The U. S. Supreme Court had interpreted the prior law as meaning substantial evidence which was deemed to mean more than a mere scintilla and to encompass such relevant evidence as the reasonable mind might accept as adequate to support a conclusion. In adopting the 1947 amendment, the Senate committee, in discussing the 1947 amendment recognized the U. S. Supreme Court construction of the meaning of the Act to the effect that substantial evidence was required but then stated:

> "Nevertheless, there has been some dissatisfaction with what has been viewed as too great a tendency on the part of the Courts not to disturb the Board's findings. . . ." Senate Report 105, 80th Congress, pp. 26, 27.

Reviewing Courts are permitted to set aside the NLRB decisions when they cannot conscientiously find that evidence supporting it is substantial when viewed in the light of the entire record including opposing evidence. *Universal Camera Corp. v. NLRB,* 1951, 340 US 474, 91 Sup Ct 456, 95 L ed 456. Conflicting evidence or evidence from which different inferences may be drawn must be considered by the reviewing court. The fact that the Board's findings of fact are supported by evidence "substantial" to justify them apart from the conflicting evidence does not make the findings conclusive. The conflicting evidence must also be considered by the reviewing court. The entire record must be considered to determine if the evidence relied upon by the Board

is substantial when viewed in its setting in the entire record, considering the inferences to be drawn from opposing evidence. Reviewing courts have often found a lack of substantial evidence on consideration of the record as a whole and have denied enforcement of the Board orders. *NLRB v. Eanet,* 1949, 179 Fed 2d 15, C of A, DC; *NLRB v. Houston Chronicle Publishing Co.,* 1954, 211 Fed 2d 848, C of A 5th, 25 Lab Cas Para 68,-305; *NLRB v. Russell Mfg. Co.,* 1951, 191 Fed 2d 358, C of A 5th Cir, 20 Lab Cas Para 66,529; *NLRB v. Gala-Mo Arts,* 232 Fed 2d 102, C of A 8th Cir, Lab Cas Para 69,916 (Reinstatement and back pay); *NLRB v. McGahey,* C of A 5th, 30 Lab Cas Para 69,974; *Pacific Gamble Robinson Co. v. NLRB,* 1950, 186 Fed 2d 106, C of A 6th Cir, 19 Lab Cas Para 66,100; *John S. Barnes Corp. v. NLRB,* 1951, 190 Fed 2d 127, Ct of A 7th Cir, 20 Lab Cas Para 66,412.

Section 10(c) of the NLRA as amended provides that orders regarding unfair labor practices shall issue "*if upon the preponderance of the testimony* taken, the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . . unfair labor practice . . ." The joint conference report, in discussing the preponderance test, states: "The conference agreement provides that the Board shall act only on the preponderance of the testimony—that is to say, on the weight of the credible evidence." "Again, the Board's decisions should show on their face that the statutory requirement has been met—they should indicate an actual weighing of the evidence, setting forth the reasons for believing this evidence and disbelieving

that, for according greater weight to this testimony than to that, for drawing this inference rather than that. Immeasurable increased respect for decisions of the Board should result from this provision." Conference Report, House Report 510, 80th Congress, pp. 53, 54. The Courts are under a duty to see that the Board does not infer facts that are not supported by evidence or that are not consistent with evidence in the record and that it does not concentrate on one element of proof to the exclusion of others, without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. "This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact . . . will very materially broaden the scope of the Court's reviewing power." Conference Report, House Report 510, 80th Congress, pp. 55, 56.

Monroe Feed Store, therefore, proceeds to an examination of the record as a whole to determine if the testimony and evidence cited by the Board in its brief is substantial when considered in the light of opposing evidence.

The Board relies upon testimony that Crockett questioned Sams on the afternoon of October 28, regarding information he had received that there had been a meeting at Sams' house and that they "had a union in there" (Tr. 12, 149-150). David Crockett was deceased at the time of the Board hearing. He was assistant manager in charge of the Corvallis operation (Tr. 12, 93). The NLRB had the affidavit of David Crockett which was given at Corvallis, Oregon, to Arthur J. Hedges, Field Examiner for the 36th Sub-region on November 20,

1953. This affidavit was offered in evidence by respondent and rejected (Tr. 196-198). In the affidavit, Crockett states that Sams came up to Crockett and said "that the meeting was in his house in Belfountain and that it was just a get-together among a few of the boys, and that there was no union man there at all." Crockett reported this matter to General Manager Geisy (Tr. 94-95). Geisy testified that Crockett had reported this matter to him and had stated that there had been a meeting, but assured Geisy that the meeting did not concern a union (Tr. 94). Geisy dismissed the conversation as having nothing to do with union organization as he had no reason to believe otherwise (Tr. 94). The Board then relies upon testimony of Kenneth Mumford that Geisy asked him who was at the union meeting, and Mumford's reply that he was there and that they all had signed union cards (Tr. 12, 13, 138-139). After the hearing, however, Kenneth Mumford executed an affidavit before a Notary Public concerning this conversation, stating "There was not any mention of union or was union brought into the conversation." (See respondent's affidavit in support of motion for leave to adduce additional evidence.) This affidavit certainly raises great doubt about whether the testimony of Kenneth Mumford was substantial evidence or not and should be inquired into. Substantiating the affidavit signed by Mumford is the testimony of June Urbach, the bookkeeper, concerning this October 30th conversation. She testified that Mumford said "we sure had a meeting out at Sams' last night," and "We had a good get-together," She specifically denied that the word "union" or the word "organization" or anything similar was used in this conversation between

Mumford and Geisy (Tr. 195). Also substantiating this testimony is testimony of Wayne Geisy concerning this conversation. Mr. Geisy testified that Mumford did not tell him that there had been a union meeting or any union activity. He testified that Mumford told him that a group of the employees had a get-together some evening prior to that time at Webster Sams' place and had had a good time (Tr. 217).

The Board relies on testimony concerning conversations between Claude Turner and Frank Harrington on October 30 (Tr. 12) to the effect that Harrington told Turner they were 100 per union. This knowledge by Turner is used by the Board to support findings that the discharges were discriminatory because knowledge of a foreman is imputed to the corporation manager, Geisy (Tr. 12). This is shown to be a shot gun approach because the Board relies on this same conversation between Turner and Harrington on October 30 to support the finding that Geisy and Crockett already knew about the union activities because Turner told Harrington that he, Turner, thought someone was trying to get a union in the mill (Tr. 156). Frank Harrington testified that Turner had told him that he had overheard a conversation between Crockett and Geisy (Tr. 156). Monroe Feed Store seeks the opportunity to take testimony of Claude Turner concerning these events, or in the alternative, to introduce in evidence the affidavit of Claude Turner, given to Arthur Hedges, Field Examiner of the NLRB, on November 19, 1953, at Monroe, Oregon, concerning this conversation wherein Turner stated that he asked Frank Harrington about the men huddling

together in groups on October 30, and that Frank Harrington told Claude Turner that they had all signed cards for the union. Turner's affidavit states that Harrington asked him not to say anything about it so he didn't. He further states that he did not say anything to Mr. Geisy about it, nor to anyone else. The affidavit further states that he and Harrington did not discuss David Crockett being in the office and that he did not recall whether Crockett was there that day or not. He further states that he did not tell Harrington anything about overhearing a conversation between Crockett and Geisy, nor did he tell Geisy that he thought that someone was trying to get a union in the mill. This affidavit of Claude Turner completely refutes the testimony of Frank Harrington. This affidavit was taken in November, 1953, prior to the hearing, and is not self-serving. The affidavit was given less than thirty days after the discharges to a Field Examiner of the Board. The statement of General Counsel for the NLRB (NLRB Brief, p. 4) "That same afternoon, Respondent's foreman, Turner, told employee Frank Harrington that he had overheard a conversation between Crockett and Geisy concerning the employees' efforts to get a union in the mill, Tr. 15, 156," does not clearly state the evidence on this matter. This was not a conversation between Crockett and Geisy concerning efforts to get a union in the mill. This was a conversation between Harrington and Turner, in which Turner told Harrington that he, Turner, had concluded that he thought someone was trying to get a union in the mill (Tr. 156). Harrington further testified that Turner said to him that he, Turner, only caught a little of the conversation between Crockett and

Geisy (Tr. 156). The statement of General Counsel that this was the conversation between Crockett and Geisy concerning the employees' efforts to get a union into the mill doesn't reflect the true testimony, which was testimony of Harrington that Turner told him "I think someone is trying to get a union in the mill." Harrington did *not* testify that Turner told him that Turner overheard Geisy and Crockett discussing union organization. If one wishes to speculate it would be as reasonable to speculate that Turner formed this opinion from the actions of the employees huddling in groups. There was a conversation between Crockett and Geisy about the meeting at Belfountain and discussions with Sams. This was a telephone conversation on October 28 (Tr. 199).

On October 30, Crockett came to the mill at Monroe and had a conference with Geisy at which time checks were made out to pay the men off at the end of the day. Geisy notified Crockett at that time that the auditors had notified him they were losing money and he was therefore going to lay the men off (Tr. 199). Conclusions of Turner communicated to Harrington are not evidence of knowledge of Geisy of the union activities.

The alleged statement of Geisy which Geisy denies, that "Before I go union, I'll shoot myself right between the eyes" (Tr. 160, 164) was allegedly made long after the discharges and after Geisy had rehired the union employees and after a charge and complaint were filed. This is little evidence that he interfered with his employes' right at an earlier period prior to the charges and NLRB complaint.

## SPECIFICATION OF ERROR II

The Board erred in failing to find that the discharges were motivated by economic consideration.

### ARGUMENT

The Board rejected as unsupported by the record respondent's claim that the discharges were necessitated by respondent's poor financial condition (Tr. 18, 19). The Trial Examiner, in his Intermediate Report and Recommended Order, stated that he did not regard Geisy as a credible witness, and therefore did not accept his explanation that the terminations were necessitated and sprang from the economic considerations (Tr. 18, 19). The Trial Examiner stated that he did not credit Geisy's testimony that he first saw the profit and loss statement on October 30 (Tr. 19, 20). The Trial Examiner admits that the profit and loss statement is significant in that it shows a substantial loss (Tr. 19). The Trial Examiner concludes that Geisy knew of the profit situation sometime before October 30. Exactly what the Trial Examiner is attempting to do in this discussion is obscure as he attempts to discredit the testimony of Geisy that Geisy on a number of occasions during October, after submission of the inventory data to the auditor, was informed by the latter of the developments tending to indicate that the operation to the end of September was unprofitable (Tr. 19, 20). The Trial Examiner then states that no such conclusion could have been reached until all of the factors affecting the profitability of respondent's business had been calculated and

appraised in relation to each other (Tr. 20). The Trial Examiner then states that he does not credit Geisy's uncorroborated testimony that someone in authority over him directed that some drastic action be taken on October 30 (Tr. 20).

Point One regarding the remarks of the Trial Examiner is that whether or not Geisy had the final profit and loss statement on October 30 or on October 28 or 29 seems immaterial in regard to whether or not the discharges sprang from economic considerations and whether or not his entire testimony should be discredited. That is Geisy's testimony and his recollection and there is absolutely no evidence tending to contradict this testimony. The Trial Examiner fails to weigh the evidence or set forth reasons for believing or disbelieving evidence given by Mr. Loomis. The testimony of Mr. Loomis corroborates the testimony of Geisy (Tr. 184-194). The profit and loss statement shows that Monroe Feed Store lost $30,000 for the period May 31, 1953, to the end of September, 1953 (Tr. 184, 186). This is an accepted fact. This is a loss of large proportions. Mr. Loomis talked to Mr. Geisy on the telephone shortly prior to October 30 concerning the figures and the profit and loss statement (Tr. 184). Mr. Loomis advised Mr. Geisy that his operation shouldn't be in the position it was in, and that the operation was unsatisfactory profit-wise (Tr. 184). In September, 1953, by reason of requests of the Bank of California, which was furnishing financing for this group of warehouses, including Monroe Feed Store, the monthly inventory system was set up. The first figures were given to the audi-

tor in September, 1953, which showed the figures reflected on the profit and loss statement, and also mill earnings. The profit and loss statement, according to Mr. Loomis, was mailed to Monroe Feed Store the latter part of October (Tr. 187). Mill earnings should be at least 50 per cent of the labor cost (Tr. 191). Mill earnings are the charge that they make for cleaning seeds, grains, or mixing of special mixes, grinding and things of that kind (Tr. 191). It is conected with profit and loss (Tr. 191). Mr. Loomis compared the mill at Amity with the mill at Monroe as far as labor costs and tonnage and the comparison showed that at Amity the mill earnings would practically balance their labor (Tr. 192). At Monroe, from May 31 to the end of September, 1953, labor cost was $39,822.00. Mill earnings were $10,404.00. For the month of October, labor cost was $8,600 and mill earnings were $3,600. In November, after the discharge, labor costs were $3,800 and mill earnings were $6,200. The ratio was reversed. These figures on mill earnings and labor costs show that the Monroe plant was not operating satisfactorily profit-wise and that this could be determined without knowing all the factors present in the profit and loss and statement (Tr. 187-191). In this respect, the Trial Examiner errs in his discussion wherein he discredits the testimony of Wayne Geisy (Tr. 18, 19, 20). In attempting to discredit the testimony of Geisy, the Trial Examiner failed to weigh the evidence or discuss the evidence of Mr. Loomis.

When Frank Harrington was laid off, Geisy told Harrington that his auditors had informed him that day that he was behind and that he was going to have to

make some changes and he just had to lay all the men off, and Geisy further informed him that the outgo was more than his income (Tr. 99, 157). On May 31, 1953, Monroe Feed Store closed its fiscal year and their operation had not been satisfactory profit-wise (Tr. 111). At that time, Mr. Burlingham and Mr. Loomis called to Mr. Geisy's attention their cost ratios of production against profit (Tr. 111, 112, 113). E. F. Burlingham and Sons owned a substantial amount of Monroe Feed Store stock. Mr. Loomis was the auditor for feed and seed companies in which E. F. Burlingham & Sons had an interest (Tr. 183).

Sometime in June or July, the inventory-taking system was instigated whereby inventories were taken each month (Tr. 111). This inventory was first taken at Monroe Feed Store as of September 30 (Tr. 111, 185). Periodically from October 1, to October 30, Mr. Geisy learned results of this inventory from Mr. Loomis and Mr. Burlingham (Tr. 111). Every two or three days, Mr. Geisy was given information as to how the inventory or profit and loss statement was developing (Tr. 111). Several times during October, Mr. Burlingham advised Mr. Geisy that his cost ratio between labor and production was not satisfactory (Tr. 112). In the middle of October, Mr. Geisy was advised that the inventories showed that there had to be some kind of reduction. It was advised by Mr. Loomis (Tr. 112). On October 30, Mr. Geisy first learned of the contents of the profit and loss statement and on October 30, Mr. Loomis advised Mr. Geisy to bring all of his records to Forest Grove to check every item (Tr. 112, 113). Mr. Loomis told Mr.

Geisy on October 30, that they had shown a loss for the period from their inventory for the close of the fiscal year until the inventory on September 30, and that it would necessitate some drastic changes. As a result of these conversations, Mr. Geisy decided to lay off his employees and make changes in his method of operation (Tr. 126). When the operation was terminated on October 30, Monroe Feed Store had less amounts of grain yet to clean than they had ever had entering into the winter in both operations (Tr. 120). Since October 30, the operation has changed and Monroe Feed Store is now selling more feed and less seed. They had such a small quantity to process on October 30 that during the winter months they had practically crossed off the seed-cleaning operation (Tr. 124-125). Since October 30, Monroe Feed Store has reduced the amount of retailing and wholesaling that necessitates putting the material into the 200-lb. bags, which reduces the requirements of labor, and material is now put into condition for selling in 50-ton lots and in bulk box-car loads (Tr. 125-126). Since October 30, Monroe Feed Store has made various changes to try to find an efficient operation and has operated its mixing crews on a day and a night basis, which enables production of approximately one and a half times the amount produced before rather than working two men together. This results in a more economical production. Monroe Feed Store has restricted its sales to more cash sales and less credit business, which reduces the number of 100-lb. sacks prepared for sale (Tr. 127). The clean-seed business was down 50 per cent in 1953. At Monroe, in 1952, they shipped 28 carloads of cleaned seed and only 14 carloads in 1953,

and in Corvallis, in 1952, they shipped 23 carloads of cleaned seed, and in 1953, they had only shipped 10 carloads of cleaned seed for the same period (Tr. 205). The change in the operation of this business is away from seeds and into more grains, and the backlog of seed and grain they had left to process after October 30 did not justify keeping the men on (Tr. 209). In the fall of 1952, one year before the lay-off, at Monroe they had an excess of 500 tons of mixtures of grain or seed-grain to be cleaned, and as of the time of the layoff on October 30, they had very little over 100 tons. The amounts of seed and grain that are delivered during the summer months and remain on hand in the fall, spell out the amount of time necessary to keep the strictly seasonal crew busy during the fall and winter, and if the amount on hand falls off, they do not have anything for these men to do. In this respect, Monroe Feed Store is definitely seasonable (Tr. 59). The grain receiving during the harvest is stacked up and stored away for cleaning and processing, and when that is completed they have no further work (Tr. 216). A large scalper machine has enabled Monroe Feed Store to handle the grain crops rather rapidly and put them into proper shape for shipping, resulting in a small amount of work to do during the winter period (Tr. 216-217).

After the discharges and after a survey of the operation, Mr. Geisy commenced rehiring employees and rehired many of the same employees who had been discharged (Tr. 102, 103, 104, 105, 106, 110). No discrimination was made between the employees, all of whom it is claimed were members of the labor organization.

## SPECIFICATION OF ERROR III

The Board erred in finding that respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively and by granting unilateral wage increases.

### ARGUMENT

November 2, 1953, the union requested recognition and bargaining (Tr. 87-90, 129, 130). Mr. Geisy indicated that he had no employees at that particular time (Tr. 190). Subsequent to November 2, Monroe Feed Store rehired some of its former employees. He first hired Tom Cook, who, prior to the rehiring, told him that he had signed a union card (Tr. 102, 103). He also rehired Floyd Cantrell, Jr. (Tr. 103), Frank Harrington and Don Harrington (Tr. 104), Ellis Conn (Tr. 106), Jess Howe, Ralph Johns and Claude Turner (Tr. 110). November 20, 1953, the union, through its attorney, requested that Monroe Feed Store recognize the union. Monroe Feed Store acknowledged this letter and requested information as to which employees the union claimed to represent (Res. Ex. 3, Tr. 221). Monroe Feed Store requested that the union enter into a consent election agreement to determine the question of representation, stating that in the event the election proved the union did represent a majority of the employees, Monroe Feed Store would be happy to enter into negotiations with a view of reaching a satisfactory collective bargaining agreement (Res. Ex. 4, Tr. 222). Monroe Feed Store again wrote to the union requesting an elec-

tion and agreed to enter in negotiations with a view to reaching a satisfactory agreement in the event the union did represent a majority of the employees, and stating that the company did not feel it could enter into an agreement without a violation of the NLRA unless the union represented a majority of the employees (Res. Ex. 6, Tr. 224). There is nothing in the record to indicate a duty on the part of the employer to bargain where the employer is in doubt as to the representation of his employees. The employer may insist upon an election to determine this matter. *Artcraft Hosiery Co.,* 78 NL RB 333; *Cohoon,* 1952, 101 NLRB 966; *Puerto Rico Container Corporation,* 1950, 89 NLRB 1570; *NLRB v. Union Pacific States, Inc.,* 1938, 99 Fed 2d 1533, C of A 9th, 1 Lab Cas Para 18,240; *Robeson Cutler Co.,* 1946, 67 NLRB 481;*G. H. Holmes Co. v. NLRB,* 1950, 179 Fed 2d 876, C of A 5th, 17 Lab Cas Para 65,605.

There is no evidence that Monroe Feed Store's proposal for a consent election was made in bad faith or that Monroe Feed Store was not motivated by sincere doubt that the union represented its employees. The union rejected the proposals for a consent election. Under these circumstances, the company is not guilty of an unfair labor practice for refusal to bargain. *Johnson dba Roanoke Public Warehouse,* 1947, 72 NLRB 1281.

Where there is no duty to bargain, a refusal to bargain does not constitute an unfair labor practice and unilateral wage increases do not constitute an unfair labor practice. An employer is not prohibited from announcing or granting economic benefits during a union's organizational campaign or even during the pendency of

a Board ordered election. *Hudson Hosiery Co.*, 72 NL RB 1434. The actions of the union and the employer subsequent to the hearing are not in question, at this time, but as a matter of fact, the employer and the union did conduct negotiations subsequent to the hearing, as a result of the finding of the Board that the union represented a majority of the employees (Tr. 14). If the employer were found guilty of an unfair labor practice for refusal to bargain in this case, it would mean that whenever a union demanded recognition and demanded to bargain that a duty immediately arose for the employer to bargain even though he had a reasonable doubt as to the majority status of the union and even though he, in good faith, attempted to resolve that doubt by agreeing to enter into a consent election, which the union spurned and refused to enter into. Monroe Feed Store filed a petition for a representation election with the NLRB (Tr. 7-9) (Tr. 85- 86).

## SPECIFICATION OF ERROR IV

The NLRB erred in rejecting as incompetent the affidavit of David O. Crockett, deceased, taken by Field Examiner of the NLRB prior to the hearing upon the complaint. Omitting the formal parts, this affidavit reads as follows:

> "I, David O. Crockett, a person of law age, being first duly sworn, make the following statement voluntarily and of my own free will:
>
> "I live at 1393 Franklin Street, Salem, Oregon. My telephone number is 2-6000. I am the manager of the Corvallis store of the Monroe Feed Store.

"On or about Wednesday, October 28, 1953 I went over to the Southern Pacific Depot to get some cars turned loose and one of the fellows there whose first name is Bill, who clerks there asked me what happened at the Union meeting the night before at Belfountain. I didn't want to admit to him that I didn't know what was going on so I just turned it off. When I came back to the office Webster Sams and H. G. Gann were eating lunch in the display room. I asked Webster then if he had attended a union meeting down in Belfountain. He said, 'In order to have a union meeting, you have to have a meeting in a union hall don't you?'

"I said: 'No, I don't think so. I've attended a lot of union meetings that were never held in a hall.'

"After he had finished his lunch about 10 minutes later he came up to me and said that that meeting was in his house in Belfountain and that it was just a get together among a few of the boys, and that there was no union men there at all.

"I remarked then that it didn't make any difference to me but that I thought that it was peculiar to be told about it by somebody over at the freight office. I also made the remark that it was odd that they would know more about things going on around here than I did. Webster agreed with me that it was odd because he knew nobody over at the Southern Pacific freight office. That was the end of our conversation.

"About the middle of the week after the men were laid off on Friday Webster Sams was in to see me about his check and he again volunteered the statement that there was no union official at the meeting at his house. I told him 'It doesn't make any difference anyway Web, you'll have to pick your check up down at Monroe because I have no authority to keep your check here.'

"Mr. Geisy called me down to Monroe on October 30, 1953 and I had a conference with him that

day. That was when he told me that he had been notified by the auditors that he had lost money and told me that we would have to lay the men off at the end of the day. The checks for the men were made out while I was down there and I brought them back with me. I believe that it was on the afternoon of Wednesday, October 28, 1953 that I talked to Mr. Geisy on the phone about the meeting at Belfountain, and told him the same thing that I have mentioned above. I think I told him that I was put out about picking up information that was going around the place that I didn't know anything about. I did not at any time tell Webster Sams that he should watch out that he didn't do anything under cover nor did I tell him that you have to advertise a union meeting thirty days in advance.

"When I told Geisy about the meeting and that Webster Sams told me that it wasn't union meeting and that I didn't like it Geisy told me to forget about it or pay no attention to it, if Webster Sams said that it wasn't a union meeting it probably wasn't. He said that the men had talked union before.

"On Monday or Tuesday, November 2 or 3, 1953, I found an old shirt soaked with diesel oil laying on the ground under the edge of the dock. I found it sometime in the middle of the morning.

"I have read the above statement consisting of one typewritten page in addition to this page.

/S/ DAVID O. CROCKETT

"Subscribed and sworn to before me this 20th day of November, 1953, at Corvallis, Oregon.

/S/ ARTHUR J. HEDGES,
Field Examiner, National Labor Relations Board, 36th Sub-Region." (Tr. 199-201)

## ARGUMENT

David O. Crockett was assistant manager of Monroe Feed Store in charge of the Corvallis operation (Tr. 93). Monroe Feed Store consists of a location at Monroe and a location at Corvallis (Tr. 57). Mr. Crockett laid off the employees at the Corvallis plant and had supervision over rehiring employees (Tr. 109, 110). The General Counsel of the NLRB relies upon the activities of Crockett and conversations between Geisy and Crockett as the basis for the findings of interference, restraint and coercion (Brief of NLRB, pp. 3, 4). At the time of the hearing, Mr. Crockett was deceased (Tr. 196, 202). Prior to his demise and prior to the hearing, David O. Crockett executed an affidavit before Arthur J. Hedges, Field Examiner for the NLRB. This affidavit was executed on November 20, 1953, at Corvallis, and is set forth in the transcript on pages 199, 200 and 201. Upon stipulation, Monroe Feed Store offered a true and correct copy of this affidavit in evidence inasmuch as the General Counsel, upon demand, refused to produce the original affidavit which was in the file of the General Counsel of the NLRB (Tr. 196, 197, 198). The Trial Examiner ruled that this document was incompetent and was rejected. Considering the fact that the General Counsel relied upon testimony of one, Harrington, that Turner told Harrington that Turner overheard a conversation between Crockett and Geisy, it would appear that the affidavit of Crockett himself would be competent evidence (Brief of NLRB, p. 4).

Oregon statutes provide (ORS 41.880): ". . . and when a detached . . . conversation . . . is given in evidence, any

other act, declaration, conversation or writing which is necessary to make it understood may also be given in evidence." This affidavit explains the conversation between Crockett and Geisy and also explains the conversation between Crockett and Webster Sams concerning whether or not the union was involved in the meeting at Belfountain as far as Mr. Sams' statement was concerned. The Trial Examiner should have admitted this affidavit. *Local No. 3, United Packinghouse Workers CIO v. NLRB* (CA 8, 1954), 210 Fed 2d 325.

## SPECIFICATION OF ERROR V

The Board erred in denying the motion of respondent for an order reopening the hearing for receipt of further testimony.

### ARGUMENT

Monroe Feed Store filed a motion with the NLRB requesting an order reopening the hearing for the receipt of further testimony. This motion was denied and Monroe Feed Store filed a motion with this court for leave to adduce additional evidence. The evidence that Monroe Feed Store seeks to make a part of the record is found in the affidavit in support of the motion for leave to adduce additional evidence. The argument is found in the brief in support for the motion for leave to adduce additional evidence filed by Monroe Feed Store in support of this motion.

## SPECIFICATION OF ERROR VI

The Board erred in ordering that respondent offer to all its employees who were discharged on October 30, 1953, immediate and full reinstatement, and that respondent make all such employees whole for any loss of earnings.

### ARGUMENT

The complaint in this case alleges a violation of Section 8(a)(1) and Section 8(a)(5) of the Act. It does not allege a violation of Section 8(a)(3) of the Act (Tr. 1-6). This Court must determine whether the Board acting within its power has ordered the appropriate remedy. *NLRB v. Parker's Prairie Cooperative Creamery Association,* CA 8, 1946, 154 Fed 2d 453. Back pay provisions of a Board order have been denied enforcement on the ground that the evidence was insufficient to show discriminatory discharges where the reinstatement provisions of the Board's order have been enforced on the ground that such order was supported by evidence showing anti-union conduct. *NLRB v. Waples-Platter Co.,* CA 5, 1944, 140 Fed 2d 228. See also *Consolidated Aircraft Corp. v. NLRB,* CA 9, 1944, 141 Fed 2d 785; *Richfield Oil Corp. v. NLRB,* CA 9, 1944, 143 Fed 2d 860. Monroe Feed Store submits that the evidence of discrimination is not substantial and is insufficient to base an award for back pay. It is not in the public interest to award back pay where the evidence of discrimination is speculative and good cause exists in the form of a loss of $30,000 for discharging

employees. One employee, Ray Joyner, challenged the employer to a fight and had a heated discussion with him (Tr. 169). In addition to challenging his employer to fight, this employee used obscene language towards his employer and told his employer that he was tired of being pushed around by "you big bastards" and stated that "he did not have to kiss anyone's ass for employment." The employer could not hire him back under any consideration, considering his attitude (Tr. 213, 214). An order of reinstatement regarding an employee with this attitude and taking these actions would not be reasonably designed to effectuate the policy of the NLRA. This would lead only to more strife and unrest.

## CONCLUSION

It is respectfully submitted by Monroe Feed Store that the order of the Board should be set aside in whole or in part. In the event the Court finds that the Order of the Board should not be set aside in whole or in part, it is respectfully submitted that the case should be remanded to the Board for the receipt of further testimony.

Respectfully submitted,

MASTERS & MASTERS,
By WILLIAM J. MASTERS,
Attorneys, Monroe Feed Store.